ANIMAL PROTECTION INSTITUTE OF AMERICA
ROY SHURTZ

IBLA 91-60, 91-62 Decided March 13, 1991

Appeals from a final multiple-use decision for the Geyser Ranch Allotment regarding livestock grazing and wild horse removal issued by the Schell Resource Area Office, Bureau of Land Management. NV 04-90-7; NV-04-90-4.

Appeal dismissed in part and referred for a hearing in part.

1. Appeals: Generally--Rules of Practice: Appeals: Hearings--Wild Free-Roaming Horses and Burros Act

   Where BLM issues a single multiple-use decision regarding both adjustment of livestock grazing privileges, which has been appealed to an Administrative Law Judge pursuant to 43 CFR 4.470, and wild horse removal, which has been appealed to the Board under 43 CFR 4770.3, the wild horse appeal may properly be referred to the Admin-istrative Law Judge to the extent it involves factual issues for hearing and consideration together with the grazing appeal.

APPEARANCES: Nancy Whitaker, Sacramento, California, for the Animal Protection Institute of America; W. Alan Schroeder, Esq., Boise, Idaho, for Roy Shurtz.

OPINION BY ADMINISTRATIVE JUDGE GRANT

On July 11, 1990, the Manager of the Schell Resource Area Office of the Ely, Nevada, District, Bureau of Land Management (BLM), issued a "Final Multiple Use Decision" (FMUD) for the Geyser Ranch Allotment, which included a "Livestock Management Decision" and a "Wild Horse and Burro Management Decision." The livestock management decision modified grazing use within the allotment and the wild horse decision proposed two gathers: a removal of horses from the Wilson Creek Herd Management Area

(HMA) 1/ and the removal of horses from the Grassy Springs or Mountain area of the Dry Lake HMA.

The livestock management portion of the decision provided for an appeal to an Administrative Law Judge pursuant to 43 CFR 4.470, and appeals were filed by Roy Shurtz, the livestock grazing permittee, and the Animal Protection Institute of America (APIA). These appeals are currently pending in the Hearings Division, Office of Hearings and Appeals, in Salt Lake City. The wild horse portion of the decision provided for an appeal to this Board pursuant to 43 CFR 4770.3. APIA and Shurtz filed appeals to the Board docketed as IBLA 91-60 and 91-62 respectively.

In both cases appealed to the Board, the notices of appeal included statements of reasons. Although both appeals were filed in August, BLM did not transmit the case files to the Board until November. 2/ In addition to

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1/ The BLM response to the appeal filed by APIA contends that the FMUD "for the Geyser Ranch Allotment does not identify a need to remove any wild horses from that portion of the Wilson Creek HMA which occurs in the allotment" (Memorandum of Oct. 29, 1990, from District Manager, Ely, to State Director, Nevada, at 3). We are unable to reconcile this statement with that portion of the decision which states that "all wild horses in excess of the appropriate management level of * * * 48 animals on that portion of the Wilson Creek Herd Management Area within the Geyser Ranch Allotment will be removed" (FMUD at 6).

2/ Review of the record shows that BLM's transmission of the case files was not consistent with the procedural requirements for the processing of appeals. When appellants' notices of appeal were filed, BLM lost jurisdiction over the cases and had no further authority to take any action on the subject matter of the appeals. James C. Mackey, 96 IBLA 356, 362-63, 94 I.D. 132, 135-36 (1987). That decision was not subject to further review by the State Director. Id. The delay in transmittal of the record which was apparently occasioned by the time required for preparation of the BLM response to appellants' statements of reasons was compounded by forwarding the record first to the State Director rather than directly to the Board "within no more than 10 business days after receipt of a notice of appeal." See Southern Utah Wilderness Alliance, 114 IBLA 326, 330 (1990); Thana Conk, 114 IBLA 263 (1990); Robert M. Perry, 114 IBLA 252, 253 n. 2 (1990); Utah Chapter Sierra Club, 114 IBLA 172, 175 (citing with approval BLM Manual 1841.15 A); see also Harriett B. Ravenscroft, 105 IBLA 324, 330 (Hughes, A.J., concurring); James C. Mackey, supra. Thus, BLM was required to forward the case record for Shurtz' appeal by Aug. 21, but it was not received until Nov. 27, more than 3 months after appellant's statement of reasons was received. The same delays occurred in the transmission of APIA's appeal. While the Board is assisted by having the benefit of BLM's response to the statement of reasons for appeal so long as regulations regarding service of copies on opposing parties are complied with, proper procedure requires prompt forwarding of the original case file. The Board has traditionally been very liberal in granting reasonable extensions of time to file statements of reasons or answers, so BLM should transmit the case file within 10 days and then request additional time to file an answer if it wishes to do so.

the case records transmitted with the appeals, BLM included memoranda dated October 29 and 31, 1990, from the District Manager to the State Director setting forth a response to each respective appellant's statement of rea-sons for appeal. With respect to the APIA appeal of the wild horse removal decision, BLM has moved to dismiss the appeal as frivolous. In the alternative, BLM requests that the appeal be remanded for an evidentiary hearing before an Administrative Law Judge together with the Shurtz appeals of the FMUD. Regarding the Shurtz appeal of the wild horse portion of the FMUD, BLM similarly requests dismissal or, in the alternative, remand for an Administrative Law Judge hearing in consolidation with the grazing appeals.

Counsel for Shurtz has opposed the BLM responses contained in the memoranda, moving to strike the answers as untimely because they were not filed within the 30-day period allowed by 43 CFR 4.414. In the alternative, Shurtz requests an evidentiary hearing before an Administrative Law Judge.

In consideration of the various preliminary motions including the hearing requests, we have provided expedited consideration of this matter.

BLM has moved to dismiss each of these appeals, contending that APIA's appeal is "frivolous and unjustified" and that Shurtz' allegations are "unfounded and fail to show that the FMUD will have an adverse [e]ffect." We decline to grant the motions. APIA has set forth reasons in this appeal similar to those raised in other appeals which were reviewed by this Board on their merits. See, e.g, Animal Protection Institute of America, 118 IBLA 20 (1991), and cases cited therein. Shurtz' appeal alleges adverse effects sufficient to warrant review on the merits. Accordingly, BLM's motions to dismiss these appeals are denied.

With respect to the motion to strike the BLM answer, we note the relevant regulation provides in pertinent part that: "Failure to answer will not result in a default. If an answer is not filed and served within the time required, it may be disregarded in deciding the appeal * * *." 43 CFR 4.414 (emphasis added). In the absence of any allegation of prejudice based on the late filing of the answer, we find it inappropriate to strike the BLM answer. Hence, the motion to strike is denied.

[1] We now turn our attention to the relationship between the issues pending in these appeals and those before the Hearings Division. Wild horse roundup decisions may be appealed here directly because no statute or regulation requires a hearing in such a case before an Administrative Law Judge nor is one required as a matter of procedural due process. 3/

3/ Because no party can establish a "legitimate claim of entitlement" with respect to the horses to be removed, no party can establish a basis for invoking a right to a hearing as a matter of due process. See Board of Regents v. Roth, 408 U.S. 564, 570 (1972); Altex Oil Corp., 73 IBLA 73, 76-77 (1983); cf., Donald Peters, 26 IBLA 235, 83 I.D. 308, aff'd, 28 IBLA 153, 83 I.D. 564 (1976); United States v. O'Leary, 63 I.D. 341 (1956) (hold-ing that hearing before Administrative Law Judge was required as matter of due process).

By statute and regulation, however, each grazing permittee has a right to a hearing before an Administrative Law Judge before grazing reductions can be fully implemented. 43 U.S.C. § 315h (1988); 43 CFR 4.470, 4160.4. This Board's jurisdiction arises when a grazing decision by the Administrative Law Judge has been appealed pursuant to 43 CFR 4.476.

The appeal filed by Shurtz includes separate statements of reasons for the livestock and wild horse decisions, although each statement incorporates the other. Shurtz asserts that there were no wild horses in the allotment in 1971 when the Wild Free-Roaming Horses and Burros Act was passed. Conse-quently, he contends it is unlawful for BLM to manage horses in the allotment, and that, if unlawful wild horse grazing were eliminated, more forage would be available for wildlife and livestock.

APIA asserts that monitoring does not support the proposed reduction in wild horse numbers and requests that forage be made available for the existing horse numbers plus an additional 1,500 animal unit months (Statement of Reasons at 7). APIA also requests a downward adjustment of grazing preference, piping of water, and removal of fences. Id. APIA further requests an investigation to determine whether the grazing permit should be cancelled. Id. at 8. Although APIA's arguments concerning these latter two issues are addressed to this Board, they relate more properly to APIA's appeal from the livestock management decision now pending in the Hearings Division.

Despite the fact that the regulations divide jurisdiction between this Board and the Hearings Division, the appeals pending in the Hearings Division and before the Board all involve the underlying question of the amount of available forage and the proper allocation of forage between horses and livestock. Shurtz has a right to a hearing which must be satisfied before action can be taken with respect to APIA's contention that the roundups should be set aside on the ground that more forage should be provided to horses and less to livestock. We therefore consider it appropriate to consolidate the appeals pending here with those pending in the Hearings Division.

Nevertheless, APIA's appeal with respect to the FMUD's proposal to remove 14 horses from the Grassy Mountain area and allow 16 to remain has previously been argued and finally resolved by our decision in Animal Protection Institute of America, supra at 25-27. Absent compelling legal or equitable reasons for reconsideration, the doctrine of administrative finality, the administrative counterpart of res judicata, bars further consideration of the issues previously decided in a new appeal. Joe N. Johnson, 103 IBLA 5, 8 (1988). Accordingly, APIA's appeal must be dis-missed in part as it relates to that particular gather.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, APIA's appeal is dismissed in part as it relates to the Grassy Mountain gather; the appeal by Shurtz and the remainder of APIA's appeal are referred to the Hearings

Division for consolidation with the appeals from the same FMUD already pending there.

C. Randall Grant, Jr.
Administrative Judge

I concur:

Will A. Irwin
Administrative Judge